Supreme Court, U.S.
FILED

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No. 98-___

In The

Supreme Court of the United States

October Term, 1998

SUSAN LYNN ROBERTS,

Petitioner,

vs.

CHARLES TIMOTHY KLING,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented by this petition are:

1. An investigator for a state District Attorney's Office, who is a certified law enforcement officer, does not have absolute prosecutorial immunity under 42 U.S.C. § 1983 for material false statements made under oath as affiant to secure an arrest warrant, and the Tenth Circuit failed to follow this Court's mandate in Cause No. 96-1602 in determining the officer did have absolute immunity.

2. Where the law governing police officers' conduct is clearly established, do Rule 56 of the Federal Rules of Civil Procedure and the Seventh Amendment's right to jury trial prohibit the trial court from making factual evidentiary determinations whether the officer could reasonably believe his conduct to be lawful and thus to have qualified immunity.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Susan Lynn Roberts, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on May 20, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit appears at Appendix A to this petition and is published at 144 F.3d 710 (10th Cir. 1998). This was the second opinion by the Tenth Circuit in this case. The first opinion by the Court appears in Appendix C and is published at 104 F.3d 316 (10th Cir. 1997). This Court originally had this case before it as Cause No. 96-1602. This Court vacated and remanded the original opinion of the Tenth Circuit to consider the case in light of *Kalina v. Fletcher*, 522 U.S. ___, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997); *See, Roberts v. Kling*, ___ U.S. ___, 118, S.Ct. 623, 139 L.Ed.2d 604 (1997).

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its judgment on May 20, 1998. Rehearing and Rehearing En Banc was denied by order filed July 31, 1998. Appendix G. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case requires an interpretation of applying 42 U.S.C. § 1983 which provides as follows:

> Every person who, under color of any statute, ordinances, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. The Basis for Jurisdiction Below.

Suit was commenced, pursuant to 42 U.S.C. § 1983, by Susan Lynn Roberts in the United States District Court for the District of New Mexico, alleging a violation of her civil rights by Charles Timothy Kling. The basis for federal jurisdiction in the district court was 28 U.S.C. § 1343(3). The district court entered summary judgment holding Charles Timothy Kling was immune from suit under 42 U.S.C. § 1983. Susan Lynn Roberts appealed to the United States Court of Appeals for the Tenth Circuit which held that Charles Timothy Kling was absolutely immune since he worked for the District Attorney's

Office of Dona Ana County, New Mexico. Susan Lynn Roberts petitioned this Court for a Writ of Certiorari as to the original decision. This Court granted certiorari, vacated and remanded this matter to the Tenth Circuit to consider the Court's decision in *Kalina v. Fletcher*, 522 U.S. ___, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997). On remand, the Tenth Circuit held that Timothy Kling was absolutely immune in preparing the criminal complaint and in seeking the arrest warrant. The Tenth Circuit further determined that Susan Lynn Roberts had failed to allege facts demonstrating that Timothy Kling intentionally executed a criminal complaint knowing New Mexico lacked jurisdiction over her and therefore Timothy Kling had qualified immunity.

B. The Facts Material to the Questions Presented.

Susan Lynn Roberts had summer visitation rights with her two children. In the summer of 1992, the children were delivered to her in El Paso, Texas. She took the children to the State of Oregon. In August, 1992, she and her ex-husband disagreed as to the date the children were to be returned. Susan Lynn Roberts' ex-husband lived in New Mexico near the Texas state line. The divorce had been granted in New Mexico. Susan Lynn Roberts did not return the children to her ex-husband by the date he contended they were to be returned. Charles Timothy Kling, a certified law enforcement officer who worked as an investigator for the District Attorney's Office of Dona Ana County, was requested by the District Attorney to investigate a complaint made by Susan Lynn Robert's ex-husband and his attorney. After an investigation, Charles

Timothy Kling was the affiant to a complaint in State Magistrate Court in Dona Ana County, New Mexico to secure an arrest warrant. In this complaint, Charles Timothy Kling stated under oath that the crime, which was the subject of his affidavit, had occurred in New Mexico on or about August 17, 1992.

At the time of the making of this affidavit, Charles Timothy Kling knew that Susan Lynn Roberts had been in the State of Oregon on or about that date and was not in the State of New Mexico. Also, at the time of the making of this affidavit, Kling knew that there was a dispute as to the time the children were supposed to be returned to the ex-husband. On the face of the decree in the divorce, the children did not have to be returned until after August 17, 1992. Later, in 1992, the judge granting the divorce interpreted the decree that the children should have been returned around August 17, 1992.

As a result of Timothy Kling's false affidavit in the state case, a federal fugitive warrant was secured by the FBI against Susan Lynn Roberts falsely claiming that she had fled the State of New Mexico to avoid prosecution. She had not been in New Mexico in August and had not fled New Mexico. She was arrested on the federal warrant and the New Mexico state warrant and jailed in Oregon on or about November 24, 1992. Shortly after the birth of her youngest child, Susan Lynn Roberts was transported to the State of New Mexico on these charges, and jailed again for approximately a month.

Her public defender filed a motion to dismiss since no crime had taken place in New Mexico. The state district judge in the criminal proceeding agreed that no

crime had occurred in New Mexico and dismissed the case. The State of New Mexico appealed this decision to the New Mexico Court of Appeals. The New Mexico Court of Appeals in an unpublished decision summarily affirmed the decision of the New Mexico District Court stating:

> There was no evidence that Mother was in New Mexico when she failed to return the children.

(Unpublished Memorandum Opinion filed November 15, 1993, in the Court of Appeals of the State of New Mexico). Appendix D

The false factual allegations in the complaint by Charles Timothy Kling, which were also relied upon by the Federal Bureau of Investigation (FBI) in filing the complaint under 18 U.S.C. § 1073, were the primary basis of Susan Lynn Roberts' suit below.

REASONS WHY THE WRIT SHOULD BE GRANTED

ISSUE NO. 1

An investigator for a state district attorney's office, who is a certified law enforcement officer, does not have absolute prosecutorial immunity under 42 U.S.C. § 1983 for material false statements under oath as affiant to secure an arrest warrant, and the Tenth Circuit failed to follow this Court's mandate in Cause No. 96-1602 in determining the officer did have absolute immunity.

This Court has issued several opinions on the issue of absolute immunity in connection with false statements on

arrest warrants. The most recent case is *Kalina v. Fletcher*, 522 U.S. ___, 118 S.Ct. 502 (1997). On remand in this case to consider *Kalina*, the panel for the Tenth Circuit determined that Timothy Kling was still entitled to absolute immunity in his preparation of the criminal complaint and seeking a warrant for Susan Lynn Roberts' arrest, even though a deputy district attorney also signed the complaint as attorney for the State of New Mexico. Timothy Kling was the affiant, not the attorney signing the pleading.

This decision conflicts with this Court's decision in *Kalina* and *Malley v. Briggs*, 475 U.S. 335 (1986). In this case, as shown in Appendix E (the Criminal Complaint), a deputy district attorney executed the complaint and arrest warrant as the attorney for the State of New Mexico. Timothy Kling merely was the affiant for the affidavit which was a part of the application for the arrest warrant. Timothy Kling also served as the factual investigator for the district attorney's office. The only difference between Timothy Kling's status in this case and the status of the deputy prosecuting attorney in *Kalina* was the fact the affiant in *Kalina* was an attorney while in this case the affiant was an investigator. In *Kalina*, this Court held that there was no prosecutorial immunity for false statements made in the affidavit. The Tenth Circuit failed to follow *Kalina*.

This is a case of significant public importance for this Court's review, since the Tenth Circuit as the Tenth Circuit did not follow the instructions of this Court to consider its original decision in light of *Kalina*. Had the Tenth Circuit considered this case in light of *Kalina*, it would have held there was no absolute prosecutorial immunity

for Timothy Kling. Timothy Kling appeared only in the capacity as an affiant and investigator. He did not exercise a prosecutorial function in this case.

The Supreme Court has granted certiorari when the lower court has not complied with the Supreme Court's mandate. *Yates v. Aiken*, 484 U.S. 211 (1988) ("Our mandate contemplated that the state court would consider whether as a matter of federal law, petitioner's conviction would stand in light of Francis. Since the state court did not decide that question, we shall do so." 484 U.S. at p. 215) On remand, the lower court must comply with the Supreme Court's mandate. *Stanton v. Stanton*, 429 U.S. 501 (1977).

The Tenth Circuit was required to follow this Court's mandate in Cause No. 96-1602. The Tenth Circuit was instructed to review this case in light of *Kalina*. The Tenth Circuit held Timothy Kling, as affiant, had absolute immunity. This holding conflicts with *Kalina* and the Supreme Court's order. It is important that courts of appeals follow the Supreme Court's instructions. Thus, certiorari should be granted.

ISSUE NO. 2

Where the law governing police officers' conduct is clearly established, do Rule 56 of the Federal Rules of Civil Procedure and the Seventh Amendment's right to jury trial prohibit the trial court from making factual evidentiary determinations whether the officer could reasonably believe his conduct to be lawful and thus to have qualified immunity.

The question of review of determination of disputed facts on summary judgment seeking qualified immunity

in a civil rights action alleging false statements in an affidavit for arrest, and the effect of Rule 56 of the Fed.R.Civ.P. and the right to trial by jury is required by the Seventh Amendment of the United States Constitution on such determination, is an important issue that should be determined by this Court. Insuring truthful testimony to secure an arrest warrant is an important issue. Judicial proceedings should be conducted with honesty and integrity and material statements in affidavits submitted to the Court should be true.

The decision of May 20, 1998 of the Tenth Circuit conflicts with the decisions of this Court in *Mitchell v. Forsyth*, 472 U.S. 511, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985) and *Malley v. Briggs*, 475 U.S. 335 (1986) and conflicts with decisions of the Courts of Appeal in *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995); *Lippay v. Christos*, 996 F.2d 1490 (3rd Cir. 1993); *Olson v. Tyler*,771 F.2d 277 (1985).

In determining whether a law enforcement officer is entitled to qualified immunity, there are two questions: 1) was the law governing the officer's conduct clearly established, 2) under that law, could a reasonable officer have believed his conduct to be lawful. *Acosta v. City and County of San Francisco*, 83 F.3d 1143 (9th Cir. 1996), *cert. denied*, 136 L.Ed2d 403, 117 S.Ct. 403.

In this case, the Tenth Circuit, after remand from this Court, determined that Susan Lynn Roberts had not demonstrated that Timothy Kling had violated a clearly established law. The Tenth Circuit held that Susan Lynn Roberts' claim should be analyzed on the facts presented to the Magistrate to support probable cause and it held

that Susan Lynn Roberts had failed to allege facts demonstrating that Timothy Kling had intentionally executed a complaint knowing New Mexico lacked jurisdiction over her.

In the affidavit, Timothy Kling stated under oath that the two crimes alleged in the criminal complaint occurred in the State of New Mexico, County of Dona Ana, on August 17, 1992. Timothy Kling further stated under oath that Susan Lynn Roberts was allowed to take the children from the State of New Mexico to the State of Oregon between July 9, 1992 and August 17, 1992. These are the only factual statements showing that any activity occurred in the State of New Mexico. Neither of these statements were true. Susan Lynn Roberts received the children in El Paso, Texas. Nothing occurred in the State of New Mexico as the state courts held in the criminal case. Based upon the false statements in the complaint, the Magistrate determined probable cause existed to believe a crime occurred in New Mexico. Thereafter, the Federal Bureau of Investigation (FBI) stated in its affidavit for an arrest warrant based on information furnished by Timothy Kling that probable cause existed to believe Susan Lynn Roberts had fled the State of New Mexico to avoid prosecution and issued an arrest warrant for violations of 18 U.S.C. § 1073. Based upon the statements given to the FBI agent by Timothy Kling, the FBI agent alleged there was probable cause for the issuance of a warrant for unlawful flight to avoid prosecution.

In fact, Susan Lynn Roberts had never fled the State of New Mexico to avoid prosecution, nor had Susan Lynn Roberts been in New Mexico in connection with the activities on or about August 17, 1992 alleged in the criminal

complaint in state court. Upon a motion to dismiss in State District Court, the State District Judge determined that no crime had occurred in the State of New Mexico. On appeal, the New Mexico Court of Appeals, in an unpublished Memorandum Decision, reached the same conclusion. In her complaint, Susan Lynn Roberts pled that Timothy Kling, under oath, falsely alleged she had committed a crime in New Mexico resulting in her false arrest in violation of her constitutional rights.

It is a clearly established law that a police officer may be liable for false statements made to secure an arrest warrant. *Malley v. Briggs*, 475 U.S. 335 (1986). There is little question that a plaintiff must allege a claim of a violation of clearly established law. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). In making the determination of whether the right is clearly established, the court examines the facts alleged by the plaintiff, not those asserted by the defendant. *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995). The law has long been clearly established in New Mexico and elsewhere that facts on an arrest warrant must be true. Thus if a police officer submits an affidavit containing statements he knows to be false or would know are false if he did not recklessly disregard the truth, the officer fails to observe a right that was clearly established. *Lippay v. Christos*, 996 F.2d 1490, 1504 (3rd Cir. 1993). In fact, the Tenth Circuit has recognized this principle in *Salmon v. Schwarz*, 948 F.2d 1131 (10th Cir. 1991). In New Mexico, the law has long been that the state must plead and prove where the offense occurred factually as a necessary element of the offense. *See, State v. Losolla*, 84 N.M. 151, 500 P.2d 436 (1972). This decision is consistent with such decisions of this Court as *United States v.*

Gaudin, 515 U.S. 506 (1995). All elements of the crime must be pled and proved.

The question in this case that should have been decided by the Tenth Circuit was whether a reasonable officer could have believed his conduct to be lawful. This is a fact question. It is hard to imagine a case where a false statement made under oath by an investigative officer could be reasonable or an officer could believe that conduct to be lawful. The analysis of the Tenth Circuit is not proper in reviewing whether there were facts to show the false statement led to a false arrest.

The proper analysis of the Tenth Circuit in this case should have been to omit the false statements in the affidavit and determine whether the complaint stated probable cause to believe a crime occurred in the State of New Mexico without these false statements. *See, Franks v. Delaware*, 438 U.S. 154 (1978); *Olson v. Tyler*, 771 F.2d 277 (1985).

Summary judgment is not appropriate where there are factual disputes. Furthermore, qualified immunity does not protect those who are plainly incompetent or those who knowingly violate the law. *Weyant v. Okst*, 101 F.3d 845 (2nd Cir. 1996), citing *Hunter v. Bryant*, 502 U.S. 224 (1991).

Without the false statements made by Timothy Kling in the affidavit that the crime occurred in the State of New Mexico, there is no evidence that a crime occurred in the State of New Mexico. Furthermore, the FBI relied upon the false statements of Timothy Kling to issue a warrant that Susan Lynn Roberts had fled the State of New Mexico to avoid prosecution. In fact, on or about

August 17, 1992, Susan Lynn Roberts had not been in the State of New Mexico, nor had she been in the State of New Mexico thereafter until she was brought to New Mexico pursuant to the arrest warrant. She did not flee the State to avoid prosecution.

The method of analysis of qualified immunity is an important issue for this Court. The criminal judicial process only functions if the information furnished to judges and juries by law enforcement officers is truthful and accurate. The system is based upon that cornerstone. A defendant has a right not to be arrested upon false allegations made to an independent magistrate by an investigator. The two-step process to determine qualified immunity should first require a legal determination was there a clearly established law. Here, the law was clearly established that police officers should not make false statements. The second issue to be determined is whether a reasonable officer could have believed his conduct to be lawful. This second step requires a factual determination. Where the facts are disputed as to this second step, Rule 56 of the Federal Rules of Civil Procedure and the Seventh Amendment of the United States Constitution require the issue be determined by the jury demanded in this case.

The Tenth Circuit failed to properly analyze this case and mixed these two elements thereby denying Susan Lynn Roberts her rights under the Seventh Amendment of the United States Constitution to a jury trial and her rights under the Federal Rules of Civil Procedure, Rule 56. This issue is important to the Court in that the Court should clearly set out and clarify for the Courts of Appeal what are legal issues which may be determined by the

Court in its determination of qualified immunity and what are factual issues which must be left to the trier of fact at trial. Susan Lynn Roberts should not be denied her right to trial in a case in which it is undisputed there was no crime. Susan Lynn Roberts alleged these facts. Yet the Tenth Circuit determined that Susan Lynn Roberts had failed to allege facts demonstrating that Timothy Kling intentionally executed a criminal complaint knowing that the State of New Mexico lacked jurisdiction of it. That is not the issue that must be decided. The issue is as above stated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 98-___

In The

Supreme Court of the United States

October Term, 1998

SUSAN LYNN ROBERTS,

Petitioner,

vs.

CHARLES TIMOTHY KLING,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SUSAN LYNN ROBERTS, Plaintiff-Appellant,	)	
v.	)	No. 95-2272
CHARLES TIMOTHY KLING, Defendant-Appellee.	)	

ON REMAND FROM THE SUPREME COURT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. No. CIV-94-1318-LH)

(Filed May 20, 1998)

Submitted on the briefs:

William L. Lutz and Hugh T. Brower of Martin, Lutz & Brower, P.C., Las Cruces, New Mexico, for Plaintiff-Appellant.

Mark D. Jarmie of Sharp, Jarmie, & Scholl P.A., Albuquerque, New Mexico, for Defendant-Appellee.

Before **PORFILIO, ALARCON,*** and **LUCERO**, Circuit Judges.

PER CURIAM

In *Roberts v. Kling*, 104 F.3d 316 (10th Cir. 1997), we affirmed the district court's grant of summary judgment to defendant Charles Timothy Kling based on absolute immunity.[1] We reasoned that Kling's conduct in signing and filing a criminal complaint against plaintiff Susan Lynn Roberts, and in seeking a warrant for her arrest, was entitled to absolute immunity because those acts are a functional part of initiating a prosecution. *See id.* at 319-20. Roberts sought a writ of certiorari, and the Supreme Court granted the writ, vacated our judgment, and remanded this matter to us for further consideration in light of *Kalina v. Fletcher*, 118 S. Ct. 502 (1997). *See Roberts v. Kling*, 118 S. Ct. 623 (1997).

In *Kalina*, the Supreme Court held that a state prosecutor was absolutely immune for her actions in preparing and filing two charging documents, including a motion for an arrest warrant, but was not entitled to

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* Honorable Arthur L. Alarcon, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

[1] After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

absolute immunity protection of her conduct in executing, under penalty of perjury, a certification for determination of probable cause. The court reasoned that this conduct was more akin to that of a complaining witness than a lawyer. *See* 118 S. Ct. at 509.

As in *Kalina*, defendant Kling signed a charging document, here a criminal complaint, against Roberts under penalty of perjury. Roberts contended, on appeal from the district court's ruling, that the complaint contained misrepresentations and omissions of material fact. Assuming without deciding that Kling acted as a complaining witness in testifying to the truth of the statements contained within the criminal complaint, a role which would deny his conduct the protection of absolute immunity under *Kalina*, we nonetheless reaffirm our earlier decision that summary judgment was properly granted to Kling in this case.

First, *Kalina* leaves untouched our affirmance of the district court's conclusion that Kling was entitled to absolute immunity for his actions in preparing a criminal complaint against Roberts and in seeking a warrant for her arrest. *See id.* The only remaining issue is whether Kling is entitled to qualified immunity for his execution of the criminal complaint, by which he affirmed the truth of the facts set forth in that document to the best of his information and belief. *See* Appellant's App. at 145 (Criminal Complaint). The district court had concluded, in an alternative analysis, that Kling was entitled to qualified immunity. We did not address that conclusion on appeal, relying instead on the court's grant of absolute immunity. *See* 104 F.3d at 322.

"We review the district court's grant of summary judgment based on qualified immunity *de novo*, applying the same standard used by the district court." *Lawmaster v. Ward*, 125 F.3d 1341, 1346 (10th Cir. 1997). Alongside the traditional summary judgment standards, *see id.* at 1346-47, we apply a two-part framework once a defendant raises the defense of qualified immunity. *See id.* at 1347. "First, the plaintiff must show the defendant's conduct violated a constitutional or statutory right; second, the plaintiff must show the right the defendant's conduct violated was clearly established such that a reasonable person in the defendant's position would have known the conduct violated the right. Unless the plaintiff makes such a showing, the defendant prevails." *Id.* (citations omitted).

We outlined the relevant facts on appeal:

> Defendant, then an investigator for the District Attorney's office in the Third Judicial District of New Mexico, investigated allegations that plaintiff had failed to return her children to the custody of their father in violation of a court order. Defendant subsequently signed and filed a criminal complaint against plaintiff before a magistrate in Dona Ana County, New Mexico, and obtained a warrant for plaintiff's arrest. Plaintiff was arrested in Oregon and extradited to New Mexico for trial. Five months after her preliminary hearing, plaintiff moved to dismiss the charges against her on jurisdictional grounds. The state trial judge dismissed the case and his decision was affirmed on appeal.

Roberts, 104 F.3d at 318. Before the district court, as on appeal, Roberts contended that Kling knowingly and

willfully misrepresented the facts and omitted information from the criminal complaint that was critical to the probable cause determination. Specifically, Roberts asserted that Kling misrepresented her whereabouts on or about August 17, 1992, as in New Mexico, and represented under oath to a magistrate that the crime charged occurred in Dona Ana County, New Mexico. Further, Roberts stated that Kling omitted information about a parenting plan between her and the children's father, information that would support her contention that she was not required to return the children until the 20th of August, 1992.

The district court determined that "[n]o material information was withheld by Defendant from the magistrate." Appellant's App. at 88 (Memorandum Opinion). Looking at the criminal complaint as a whole, the court held that the supporting statement of facts "clearly discloses" that Roberts was not in New Mexico on or about August 17, 1992. *Id.* at 87. The court concluded that the opening statement in the complaint, indicating that Roberts committed a crime in Dona Ana County, New Mexico, was "jurisdictional, not factual." *Id.* Similarly, the court rejected plaintiff's argument about the parenting plan information. It found that the information could be inferred from the statement of facts supporting the complaint, and also ruled that the information was irrelevant to the probable cause determination because the complaint was sworn out on August 21, 1992.

On appeal of the court's qualified immunity ruling, Roberts argued that the district court exceeded its role under applicable summary judgment standards by making credibility determinations, weighing the evidence and

deciding issues in Kling's favor. Appellant's Br. at 22. While acknowledging that qualified immunity is a question of law, she also contends that whether Kling acted as a reasonably competent law enforcement officer is an issue for the jury. *Id.* at 23. Roberts attempts to cast this determination as factual and also seeks to demonstrate factual disputes on point; however, we agree with the district court that Roberts has not demonstrated that Kling violated clearly established law. In making the case-by-case determinations required in the highly fact-driven area of qualified immunity, our job is to "evaluate the totality of the circumstances to determine, as a matter of law, whether the plaintiff has stated sufficient facts to show the defendant [ ] violated . . . her constitutional rights." *Lawmaster,* 125 F.3d at 1349. The district court correctly analyzed Robert's claims in light of all of the facts presented to the magistrate in support of probable cause. It correctly concluded that Roberts failed to allege facts demonstrating that Kling intentionally executed the criminal complaint knowing that New Mexico lacked jurisdiction over her. Appellant's App. at 89-90.

We reaffirm our earlier opinion affirming the district court's grant of absolute immunity to Kling for his conduct in preparing the criminal complaint against Roberts and in seeking a warrant for her arrest. We affirm the district court's judgment granting Kling qualified immunity for his conduct in executing the criminal complaint. The judgment of the United States District Court for the District of New Mexico is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SUSAN LYNN ROBERTS, Plaintiff-Appellant,	)	No. 95-2272 (D.C. No. CIV-94-1318-LH)
v.	)	
CHARLES TIMOTHY KLING, Defendant-Appellee.	)	

JUDGMENT

Filed May 20, 1998

Before PORFILIO, ALARCON*, and LUCERO, Circuit Judges.

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*Honorable Arthur L. Alarcon, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

This case originated in the District of New Mexico and was submitted on the briefs at the direction of the court.

The judgment of that court is affirmed.

Entered for the Court
PATRICK FISHER, Clerk

by: /s/ Frieda Garvin
Deputy Clerk

APPENDIX C

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SUSAN LYNN ROBERTS, Plaintiff-Appellant, v. CHARLES TIMOTHY KLING, Defendant-Appellee.	)	No. 95-2272 (Filed Jan. 6, 1997)

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW MEXICO
(D.C. No. CIV-94-1318-LH)

Submitted on the briefs:

William L. Lutz and Hugh T. Brower of Martin, Lutz & Brower, P.C., Las Cruces, New Mexico, for Plaintiff-Appellant.

Mark D. Jarmie of Sharp, Jarmie, & Scholl P.A., Albuquerque, New Mexico, for Defendant-Appellee.

Before PORFILIO, ALARCON,* and LUCERO, Circuit Judges.

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* Honorable Arthur L. Alarcon, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

PORFILIO, Circuit Judge.

I. INTRODUCTION

Plaintiff Susan Lynn Roberts appeals from the district court's grant of summary judgment to defendant on her civil rights complaint, filed pursuant to 42 U.S.C. § 1983. She challenges as legal error the district court's grant of absolute immunity, and alternatively, qualified immunity, to defendant. We have jurisdiction over this appeal under 28 U.S.C. § 1291.[1] Our review of the district court's summary judgment decision is de novo, applying the same legal standards as those employed by the district court to determine whether a genuine issue of material fact precludes summary judgment, and, if not, whether the moving party is entitled to judgment as a matter of law. *See Wolf v. Prudential Ins. Co.*, 50 F.3d 793, 796 (10th Cir. 1995).

The underlying facts are undisputed. Defendant, then an investigator for the District Attorney's office in the Third Judicial District of New Mexico, investigated allegations that plaintiff had failed to return her children to the custody of their father in violation of a court order. Defendant subsequently signed and filed a criminal complaint against plaintiff before a magistrate in Dona Ana

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[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

County, New Mexico, and obtained a warrant for plaintiff's arrest. Plaintiff was arrested in Oregon and extradited to New Mexico for trial. Five months after her preliminary hearing, plaintiff moved to dismiss the charges against her on jurisdictional grounds. The state trial judge dismissed the case and his decision was affirmed on appeal. In her civil rights complaint against defendant, plaintiff contended, in relevant part, that defendant knowingly and willfully executed the criminal complaint based on false and misleading factual allegations, resulting in the issuance of a warrant for her arrest.[2]

Defendant contended he was immune from plaintiff's suit, and the district court agreed. The district court concluded that defendant was entitled to absolute prosecutorial immunity, holding that defendant's actions in swearing out a complaint and seeking an arrest warrant were "functionally initiating a criminal prosecution." Appellant's App. at 81. Further, the court held that defendant was also entitled to qualified immunity. *See id.* at 89.

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[2] Plaintiff also alleged in her complaint that defendant violated her constitutional rights by 1) providing false information to the Federal Bureau of Investigation, leading to a federal warrant for her arrest, 2) issuing publicity containing false statements about plaintiff, and 3) making false statements to the media. However, on appeal she does not challenge the district court's resolution of these allegations in defendant's favor. Accordingly, she has waived appellate review of those issues. *See State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994).

II. ABSOLUTE IMMUNITY

A.

Absolute immunity "defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976). Under the "functional approach" adopted by the Supreme Court, " 'we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.' " *Spielman v. Hildebrand*, 873 F.2d 1377, 1381 (10th Cir. 1989) (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)). In other words, absolute immunity " 'is justified and defined by the functions it protects and serves, not by the person to whom it attaches.' " *Mee v. Ortega*, 967 F.2d 423, 425 (10th Cir. 1992) (quoting *Forrester*, 484 U.S. at 227).

In *Imbler v. Pachtman*, the Supreme Court held that state prosecutors are entitled to absolute immunity from § 1983 suits for activities within the scope of their prosecutorial duties. 424 U.S. at 420. The Supreme Court defined the activities deserving of immunity as those "intimately associated with the judicial phase of the criminal process," such as "initiating a prosecution and . . . presenting the State's case." *Id.* at 430-31. Similarly, this court has noted that the analysis of prosecutorial immunity is based on a continuum: "the more distant a function is from the judicial process and the initiation and presentation of the state's case, the less likely it is that

absolute immunity will attach." *Gagan v. Norton*, 35 F.3d 1473, 1475 (10th Cir. 1994) (further quotation omitted).

" 'Although identifying those acts entitled to absolute immunity is not always easy, the determinative factor is "advocacy" because that is the prosecutor's main function and the one most akin to his quasi-judicial role.' " *Spielman*, 873 F.2d at 1382 (quoting *Rex v. Teeples*, 753 F.2d 840, 843 (10th Cir. 1985) and citing *Meade v. Grubbs*, 841 F.2d 1512, 1532 (10th Cir. 1988)); *see Gagan*, 35 F.3d at 1475; *Pfeirffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1490 (10th Cir. 1991). In contrast, when a prosecutor acts in an administrative or investigative capacity, those activities are entitled to qualified immunity only. *See England v. Hendricks*, 880 F.2d 281, 285 (10th Cir. 1989) (citing *Meade*, 841 F.2d at 1532).

The district court's decision that defendant is entitled to absolute immunity is a question of law which we review de novo. *See England*, 880 F.2d at 285. In this case, we think it is clear that defendant's actions in swearing out a complaint against plaintiff were prosecutorial in nature. He was initiating a judicial proceeding as part of the District Attorney's office.[3] *See Snell v. Tunnell*, 920 F.2d 673, 693 (10th Cir. 1990) (filing charges was act "within the continuum of initiating and presenting a criminal

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[3] We note that although defendant was employed as an investigator, under the functional approach, we focus on the nature of his actions in this case. Defendant need not be a prosecutor to be afforded prosecutorial immunity; the immunity extends to those who perform equivalent functions. *See Hill v. City of New York*, 45 F.3d 653, 660 (2d Cir. 1995) (employees of district attorney's office); *Pfeiffer*, 929 F.2d at 1489-90; *Meade*, 841 F.2d at 1532 n.18.

case"); *Lerwill v. Joslin*, 712 F.2d 435, 437 (10th Cir. 1983) ("filing a criminal complaint . . . was clearly an initiation of a prosecution").

B.

The Supreme Court has recognized that prosecutorial functions may also involve some activities preliminary to the initiation of an action, including actions away from the courtroom. *See Imbler*, 424 U.S. at 431 n.33. Because of their connection to the critical judicial role that a prosecutor plays, those activities are also afforded absolute immunity. *See Pfeiffer*, 929 F.2d at 1490 (immunity may attach to even administrative or investigative acts when necessary for a prosecutor to function as an officer of court).

The remaining question, then, is whether defendant's act of obtaining an arrest warrant was performed in his role as an advocate, *see England*, 880 F.2d at 285, or, in other words, whether his actions "constituted advocacy functions sufficiently related to initiating judicial proceedings to justify absolute immunity." *Spielman*, 873 F.2d at 1382. One factor, although not always dispositive, is whether the acts complained of were taken before or after a determination of probable cause. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 274 & n.5 (1993). Although plaintiff contends that issues of fact exist as to the District Attorney's decision regarding probable cause, it is clear that the Chief Deputy District Attorney signed the complaint before defendant performed any of the acts complained

of.[4] The District Attorney's undisputed testimony was that, in signing the complaint, the Chief Deputy District Attorney was approving the complaint "as it relates to probable cause." Appellant's App. at 131. Because defendant's actions followed a probable cause determination, they are more closely associated with the judicial process and the prosecutorial function of an advocate for the state.

Additionally, "[w]e have held that a critical factor for absolute prosecutorial immunity 'involves a prosecutor's acts as an advocate before a neutral magistrate.' " *Snell*, 920 F.2d at 693 (quoting *Lerwill*, 712 F.2d at 437). Plaintiff does not challenge defendant's investigation of the facts, only his conduct before the magistrate. In *Burns v. Reed*, 500 U.S. 478, 491-92 (1991), the Supreme Court held that a prosecutor's appearance and presentation of evidence before a judge to secure a search warrant was entitled to absolute immunity, concluding that the prosecutor was acting as advocate for the state and that immunity would serve the policy of protecting the " 'judicial phase of the criminal process.' " *Id.* at 492 (quoting *Imbler*, 424 U.S. at 430). Similarly, defendant's seeking an arrest warrant before a magistrate is associated with the judicial process.

Finally, the act of obtaining an arrest warrant in conjunction with the filing of a criminal complaint is

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[4] Defendant signed the criminal complaint as the complainant, and the Chief Deputy District Attorney signed in the "Approved" section, to indicate approval by the District Attorney's office. Appellant's App. at 145.

functionally part of the initiation of a criminal proceeding, and therefore prosecutorial in nature. As this court stated in *Lerwill v. Joslin*:

> [W]e think that a prosecutor's seeking an arrest warrant is too integral a part of his decision to file charges to fall outside the scope of Imbler. The purpose of obtaining an arrest warrant is to ensure that the defendant is available for trial and, if found guilty, for punishment. Without the presence of the accused, the initiation of a prosecution would be futile. Thus, a prosecutor's seeking a warrant for the arrest of a defendant against whom he has filed charges is part of his "initiation of a prosecution" under Imbler.

712 F.2d at 437-38.

This court has held that "a prosecutor's absolute immunity has extended to his procurement of an arrest warrant." *Lerwill*, 712 F.2d at 437.[5] We conclude that

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[5] The Ninth Circuit has recently called *Lerwill* into question, noting that it was issued before current Supreme Court authority on the subject of prosecutorial immunity. *See Fletcher v. Kalina*, 93 F.3d 653, 656 n.3 (9th Cir. 1996). Other circuits continue to cite *Lerwill* as authority for the proposition that, in seeking an arrest warrant in connection with filing charges against a defendant, a prosecutor is functioning as an advocate for the state and is entitled to absolute immunity. *See Pinaud v. Suffolk*, 52 F.3d 1139, 1150 (2d Cir. 1995); *Ehrlich v. Giuliani*, 910 F.2d 1220, 1223 (4th Cir. 1990); *Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir. 1987); *Joseph v. Patterson*, 795 F.2d 549, 555 (6th Cir. 1986). *See also Schrob v. Catterson*, 948 F.2d 1402, 1414 (3d Cir. 1991) (noting split of authority regarding absolute immunity "in the context of the prosecutorial decision to seek an arrest or search warrant,"). We reaffirm our position in *Lerwill* because, as discussed below, we conclude it is consistent with the more recent Supreme Court pronouncements.

defendant is entitled to absolute immunity for seeking an arrest warrant in connection with the charges being filed against plaintiff under the auspices of the District Attorney's office. It is clear from the record on appeal that the purpose of the warrant was to secure plaintiff's presence to defend against the criminal charges and, as a by-product, to find the children who had not been returned to their father. The warrant was not investigative or used as the means to find more information before deciding that the case should be prosecuted, but was sought at the same time the charges against plaintiff were filed. *See also Snell*, 920 F.2d at 693 ("a prosecutor who performs functions within the continuum of initiating and presenting a criminal case, such as . . . seeking an arrest warrant . . . ordinarily will be entitled to absolute immunity"); *Pena v. Mattox*, 84 F.3d 894, 896 (7th Cir. 1996) (defendant properly claimed absolute immunity with regard to drafting and authorizing original criminal complaint and procuring arrest warrant).

C.

On appeal, as before the district court, plaintiff contends that the Supreme Court's opinion in *Malley v. Briggs*, 475 U.S. 335 (1986) is dispositive here. In *Malley*, the Supreme Court denied absolute immunity to a police officer who sought an arrest warrant following his investigation of the defendants. Plaintiff here asserts that, defendant, a certified law enforcement officer, should be denied absolute immunity because his acts were the same as those of the police officer in *Malley*.

We disagree. First, defendant's status as a certified law enforcement officer is irrelevant to the determination of whether his actions are entitled to immunity, under the functional approach.[6] Second, while defendant's acts in swearing out a complaint and obtaining a warrant for plaintiff's arrest are closely similar to the acts which afforded the defendant only qualified immunity in *Malley*, the acts themselves are not the focus of the functional approach. Instead, we examine the function a defendant's acts serve. *See Imbler*, 424 U.S. at 430 (approving Court of Appeals' focus on "the functional nature of the activities"); *McCarthy v. Mayo*, 827 F.2d 1310, 1314 (9th Cir. 1987) (looking to "the nature or function of the ultimate act" in determining entitlement to prosecutorial immunity); *Barr v. Abrams*, 810 F.2d 358, 361 (2d Cir. 1987) (analyzing immunity on "functional basis").

We are mindful of case law reasoning that different actors performing the same acts should receive the same level of immunity. *See, e.g., Fletcher*, 93 F.3d at 655-56. Nonetheless, we think that the proper focus is on the function an act serves, not the act itself. Further, we think

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[6] Plaintiff contends on appeal that the district court ignored the functional test when, in distinguishing *Malley* from the present case, it commented that defendant was not a police officer. Then, in an interesting reverse, plaintiff appears to argue that defendant's status as a certified law enforcement officer is a factor in favor of applying *Malley*. Appellant's Br. at 19. We think plaintiff's argument misses the mark. Here, the district court noted that plaintiff "was not a police officer capable of depriving people of valuable rights," but worked directly for the district attorney. The court then summarized defendant's actions in this case. The court's analysis clearly did not ignore the functional approach, but applied it.

Supreme Court authority supports this analysis. In *Buckley*, the Court's opinion indicates that the act of interviewing witnesses may or may not be entitled to absolute immunity, depending on the role of the actor: "There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause." 509 U.S. at 273.[7] In *Malley* itself, the Supreme Court recognized the distinction between function and conduct, finding unpersuasive the proposed analogy between a police office seeking an arrest warrant and a prosecutor seeking an indictment. 475 U.S. at 342-44. The policy considerations underlying a grant of immunity focus on the function or role an individual fulfills in performing certain acts, not on the acts alone. "We have

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[7] A majority of cases applying the same act/same immunity analysis cite to *Buckley* as authority. *See, e.g., Guzman-Rivera v. Rivera-Cruz*, 55 F.3d 26, 30 (1st Cir. 1995); *Giuffre v. Bissell*, 31 F.3d 1241, 1252 (3d Cir. 1994). In *Buckley*, the Court, quoting the Seventh Circuit, used "same act" language in a discussion of the various functions that a prosecutor performs. 509 U.S. at 273. However, the opinion as a whole reflects an emphasis on function, not conduct alone. Other cases cite to the Supreme Court's opinion in *Burns* as support for this kind of analysis, *see Schrob*, 948 F.2d at 1415 n.12. However, the *Burns* court did not compare like acts in its analysis. The Court noted: "it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for *following the advice*." 500 U.S. at 494 (emphasis added). The opinion goes on to reject arguments that the act of giving advice to the police was part of the prosecutorial capacity or closely associated with the judicial process. *Id.* at 495-96. We conclude that neither *Buckley* nor *Burns* is contrary to our reasoning here.

interpreted § 1983 to give absolute immunity to functions 'intimately associated with the judicial phase of the criminal process,' not from an exaggerated esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself." *Malley,* 475 U.S. at 342 (quoting *Imbler,* 424 U.S. at 430).

III. SUMMARY JUDGMENT

Plaintiff also contends that the district court erred when it ignored genuine issues of material fact which preclude summary judgment on the basis of absolute immunity. She takes issue with the district court's statements that the District Attorney had concluded that probable cause existed to believe plaintiff had violated the applicable statute and that a criminal complaint should be filed. To support her contention that these matters are genuinely disputed, she cites to the District Attorney's deposition. She contends that he testified he did not make a determination that probable cause existed, but determined only that defendant should investigate further, and he did not instruct defendant to obtain a warrant for plaintiff's arrest. Therefore, she argues, there is factual dispute "as to whether [defendant] was functionally initiating a criminal prosecution." Appellant's Br. at 21.

A careful review of the deposition testimony leads us to conclude that plaintiff's arguments on this point have no merit. The District Attorney did, indeed, state that he sent defendant to investigate whether probable cause existed as to each essential element, *see* Appellant's App.

at 131, 138, and that he had not authorized the filing of a criminal complaint before defendant investigated the relevant facts, *see id.* at 133. However, he also testified that if defendant's investigation corroborated the facts as preliminarily reported, then there was probable cause to believe a crime had been committed. *See id.* at 140. Specifically, he said: "In speaking with [defendant], I instructed him to do the investigation, sign whatever his investigation revealed, and if they were consistent with what information was given to me [ ], that would be probable cause to go forward." *Id.* He also testified that the information in the Statement of Facts prepared by defendant was consistent with the information as preliminarily reported, and that the Chief Deputy District Attorney, "in signing the criminal complaint, determined, based on his own experience, that there were sufficient facts alleged to constitute probable cause to file a criminal complaint." *Id.*

While the District Attorney did not make an actual probable cause determination before defendant's investigation, once the reported facts were verified by defendant's investigation, both he and the Chief Deputy District Attorney believed that probable cause existed to go forward with a criminal complaint. Therefore it is undisputed that defendant's actions in seeking an arrest warrant and swearing out a complaint followed a determination of probable cause within the District Attorney's office.

IV. CONCLUSION

Because we conclude that defendant is entitled to absolute prosecutorial immunity under the facts of this case, we need not address plaintiff's arguments regarding the district court's alternative holding that defendant would be entitled to qualified immunity. The judgment of the United States District Court for the District of New Mexico is AFFIRMED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

SUSAN LYNN ROBERTS,	)	
Plaintiff,	)	
-vs-	)	No. CIV 94-1318 LH/WWD
CHARLES TIMOTHY KLING,	)	
Defendant.	)	

ORDER

(Filed Nov. 08, 1995)

THIS MATTER comes before the Court on Defendant's Motion for Summary Judgment (Docket No. 22). A memorandum opinion was entered on this date. For the reasons set forth therein, the Court **FINDS** that Defendant's Motion for Summary Judgment is well taken and will be **GRANTED**.

IT IS, THEREFORE, ORDERED that Defendant's Motion for Summary Judgment **IS GRANTED** and this case **IS DISMISSED** with prejudice.

/s/ LeRoy Hansen
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SUSAN LYNN ROBERTS,	)	
Plaintiff,	)	
-vs-	)	No. CIV 94-1318 LH/WWD
CHARLES TIMOTHY KLING,	)	
Defendant.	)	

MEMORANDUM OPINION

(Filed Nov. 08, 1995)

THIS MATTER came on for a hearing before the Court on August 17, 1995, on Defendant's Motion for Summary Judgment (Docket No. 22). The Court, having reviewed the submissions and arguments of the parties, finds that Defendant's Motion for Summary Judgment is well taken and should be granted.

Plaintiff brought this 42 U.S.C. § 1983 action in federal court alleging violations of her Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights stemming from the defendant allegedly filing a false and erroneous criminal complaint against her. The core of Plaintiff's claims against Defendant is that Defendant knowingly, or with reckless disregard, made material misrepresentations or omissions in swearing out a complaint for the arrest of Plaintiff. Plaintiff argues that Defendant could

not reasonably believe Plaintiff could be subject to jurisdiction for violating New Mexico's Custodial Interference statute[1] and that he failed to apprise the magistrate of this failure of jurisdiction. She contends that these misrepresentations or omissions resulted in the issuance of an arrest warrant and subsequent arrest and extradition of Plaintiff from Oregon for violating New Mexico's Custodial Interference statute. The criminal complaint against Plaintiff was eventually dismissed by the trial court for lack of jurisdiction. The New Mexico Court of appeals affirmed the trial court's dismissal.[2]

Defendant has moved for summary sudgment [sic] on the basis of both absolute immunity and qualified immunity.

Standard for Summary Judgment

A summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). On review, the party opposing summary judgment benefits from all reasonable doubts in

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[1] NMSA 1978, § 30-4-4(B) (Cum. Supp. 1993). The statute provides as follows:

> B. Custodial interference consists of any person, having a right to custody of a child, maliciously taking, detaining, concealing or enticing away or failing to return that child without good cause and with the intent to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody. Whoever commits custodial interference is guilty of a fourth degree felony.

[2] *New Mexico v. Roberts,* No. 14,976 (N.M. Ct. App. 1993).

determining whether a genuine material factual issue exists. *Id.* at 321-323.

Background

The material facts relevant to the issues in this case are not in dispute. Plaintiff is the mother of two children from a now terminated marriage to Mr. Ronald Roberts. On July 9, 1992, Plaintiff came to New Mexico, Dona Ana County, and signed a Parenting Plan, which was incorporated by reference into the Final Custody Order filed in their divorce case on July 21, 1992, in the Third Judicial District Court in Dona Ana County. Under the provisions of this Plan and Order, Mr. Roberts retained primary physical custody in New Mexico of the two children and Plaintiff was granted delineated visitation privileges, including the right to a six-week visitation period each summer. After executing the plan in Dona Ana County on July 9, 1992, Plaintiff requested that Mr. Roberts deliver the children to Plaintiff's hotel room in El Paso, Texas. Plaintiff then took the children with her to her home in Oregon for a planned six-week visit. There is a dispute in the record as to when the parents had agreed that the children would be returned to New Mexico. Mr. Roberts alleges that they agreed to have the children back in New Mexico two days prior to the commencement of school, or August 17, 1992. Six weeks from July 9, 1992, however, would be August 20, 1992. As will be explained below, this fact is not material to the issues before the Court.

Mr. Roberts contacted Plaintiff on August 16, 1992, to determine the details associated with his children's return to New Mexico. Plaintiff informed Mr. Roberts that

she had until August 20 to return the children, but that in any event, she intended to keep them with her in Oregon and to enroll them in a local school. Mr. Roberts then contacted his divorce attorney, Jerald A. Valentine, and informed him of the conversation he had with Plaintiff. Mr. Valentine contacted Steven Stevers, Plaintiff's divorce attorney, and informed him of Plaintiff's stated intent not to return the children. After discussions with Plaintiff, Mr. Stevers subsequently contacted Mr. Valentine and informed him that the children would be returned to New Mexico on August 21, 1992, and relayed the associated flight information. Mr. Roberts met the designated flight at the airport on August 21, 1992, however, the children were not on the plane.

Mr. Roberts then contacted Michael Sheehy, an attorney in Tualatin, Oregon, in order to obtain a Warrant in Lieu of Writ of Habeas Corpus in Washington County, Oregon. The warrant commanded that the children be taken into custody as they were being illegally held by Plaintiff. After attempted service of the warrant on August 21, 1992, Mr. Sheehy informed Mr. Roberts that the deputy sheriff was told that Plaintiff had vacated her last known address and had taken the children to Alaska.

Mr. Valentine contacted Third Judicial District Attorney Douglas Driggers and informed him of the undisputed facts outlined above, with the exception of the fact that the children were delivered to the Plaintiff's El Paso, Texas hotel room on July 9, 1992. After examining New Mexico's Custodial Interference statute and based on his discussions with Mr. Valentine, District Attorney Driggers concluded that the statute had been violated, that there was probable cause to believe that each and every

element of custodial interference had been committed, and that a criminal complaint should be filed. District Attorney Driggers then instructed Defendant to meet with Mr. Roberts on August 21 and verify the information relayed to him by Mr. Valentine and to obtain relevant documents. District Attorney Driggers also instructed Defendant to then sign and file a criminal complaint, as prepared and approved by an assistant district attorney, and to obtain a warrant for the arrest of Plaintiff.

Defendant met with both Mr. Valentine and Mr. Roberts and obtained verification of the facts relayed by Mr. Valentine to District Attorney Driggers. In addition, Defendant obtained copies of the Final Custody Order and the executed Parenting Plan. Based on this information, Defendant swore out a criminal complaint before a Magistrate Judge in the Magistrate court of Dona Ana County. The criminal complaint included a Statement of Facts outlining the information given him by Mr. Roberts and was prepared and approved by Alfred J. Perez, Chief Deputy District Attorney. The magistrate judge found that probable cause existed and subsequently issued a warrant for Plaintiff's arrest.

Plaintiff was arrested in Oregon on November 24, 1992, still in possession of the two children and having had no further contact with Ronald Roberts after the August 16 telephone conversation. Plaintiff was extradited to New Mexico on February 4, 1993. At a February 15, 1993 preliminary hearing, Judge Maynez found probable cause for the charges and a criminal information was filed on February 17, 1993. Plaintiff was present at the Preliminary Hearing and was represented by Assistant Public Defender Samuel Z. Damon. Mr. Damon filed a

motion to dismiss based on lack of jurisdiction in July, 1992, nearly five months after Plaintiff's Preliminary Hearing. District Judge Beal granted Plaintiff's motion to dismiss and the State of New Mexico appealed. The New Mexico Court of Appeals affirmed the dismissal.

Plaintiff argues that Defendant falsely swore that the violation of the Custodial Interference statute took place in the State of New Mexico, within Dona Ana County on or about August 17, 1992. Plaintiff's argument to the trial court, prior to the charges against her being dismissed, and again here in this Court, is that the State of New Mexico lacked jurisdiction over her because an essential element of the crime (i.e., either the taking of the two children or the failing to return the two children) did not take place in New Mexico. It is undisputed that neither Plaintiff nor the two children were in the State of New Mexico at any time on or about August 17, 1992.

Defendant Kling is Entitled to Absolute Immunity

Defendant's first basis for summary judgment is that he is entitled to absolute immunity from suit for damages because he was acting at the direction of District Attorney Driggers in swearing out the criminal complaint for the arrest of Plaintiff and was, therefore, performing the function of a prosecutor in initiating and pursuing a criminal prosecution for the state.

Government prosecutors enjoy absolute immunity from suit under 42 U.S.C. § 1983 for monetary relief where the challenged conduct is intimately involved with the judicial proceeding. *Imbler v. Pachtman*, 424 U.S. 409

(1976). The purpose of this immunity is to protect prosecutors from the "serious danger that the decision to initiate proceedings will provoke a retaliatory response." *Id.* Thus, a prosecutor enjoys absolute immunity from damages under Section 1983 when he "initiat[es] a prosecution and . . . present[s] the State's case." *Id.* at 431. However, such immunity does not extend to actions of a non-prosecutorial nature, such as purely investigative, advisory or administrative tasks. *See Burns v. Reed,* 500 U.S. 478 (1991); *Harlow v. Fitzgerald,* 457 U.S. 800, 811 n.16 (1982); *Snell v. Tunnel,* 920 F.2d 673, 686 (10th Cir. 1990).

The Supreme Court's absolute immunity cases illustrate the critical importance of an official's "function" in this inquiry. "[I]mmunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches." *Forrester v. White,* 484 U.S. 219, 227 (1988). "[A] functional approach to immunity requires that those performing like functions receive like immunity." *Snell v. Tunnell,* 920 F.2d 673, 690 (10th Cir. 1990), *cert. denied,* 499 U.S. 976 (1991). Thus, the fact that Defendant was an investigator for the district attorney does not change the nature of the inquiry as to whether he is entitled to absolute immunity for swearing out a criminal complaint.

Plaintiff points to the Supreme Court's decision in *Malley v. Briggs,* 475 U.S. 335 (1986) as being dispositive. In *Malley,* a police officer sought absolute immunity from suit for his alleged wrongful conduct in applying for arrest warrants. Looking to the common law availability of immunity at the time of the passage of 42 U.S.C. § 1983, the Court concluded the police officer was entitled

only to the defense of qualified immunity. *Id.* at 340-341.[3] Thus, Plaintiff argues, Defendant, like the police officer in *Malley*, is not entitled to absolute immunity. However, I believe Plaintiff's reading of *Malley* is too expansive and ignores subsequent Supreme Court decisions.

Malley dealt with the situation of an independent police officer seeking a judicial determination of probable cause for the issuance of arrest warrants. The facts of this case are distinguishable. First, Defendant was not a police officer capable of depriving people of valuable rights. *See Atkins v. Lanning*, 556 F.2d 485, 488-489 (10th Cir. 1977). Instead, he worked directly for the district attorney. In addition, the undisputed facts disclose that Driggers made the determination, after his initial discussion with Mr. Valentine and his review of New Mexico's Custodial Interference statute, that if the information relayed to him was verified, probable cause for the arrest of Plaintiff existed. Defendant investigated and verified the information originally presented to Driggers and helped prepare a criminal complaint. The criminal complaint was then approved by Chief Deputy District Attorney Perez. Thus, at the time Defendant swore out the criminal complaint before the magistrate judge, District Attorney Driggers had already determined that probable cause existed for Plaintiff's arrest.

In *Buckley v. Fitzsimmons*, 113 S. Ct. 2606 (1993), the Court concluded that in determining whether prosecutors

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[3] In 1871, "one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause." *Id.*

were entitled to absolute immunity, the question was whether they were functioning as advocates for the state. *Id.* at 2616. The Court held that "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* Here, District Attorney Driggers concluded probable cause for Plaintiff's arrest existed and directed Defendant to swear out a criminal complaint in support of that conclusion. Thus, I conclude that in seeking an arrest warrant in this case, at the request of District Attorney Driggers, Defendant was functionally initiating a criminal prosecution, an act for which he is entitled to absolute immunity from suit under 42 U.S.C. § 1983. *Lerwill v. Joslin,* 712 F.2d 435 (10th Cir. 1983).

Even were I to conclude that Defendant was not entitled to absolute immunity, the undisputed material facts disclose that he is entitled to the defense of qualified immunity.

Defendant Kling is Entitled to Qualified Immunity

In evaluating the defense of qualified immunity, the Court must compare the "objective reasonableness" of the conduct complained of with the state of the law at the time of the alleged violation. *Harlow,* 457 U.S. at 818. "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* for plaintiffs to defeat a claim of qualified immunity, the "contours of the right must be sufficiently clear that a reasonable

official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Once a defendant raises the defense of qualified immunity, the plaintiffs must "come forward with facts or allegations to show both that the defendant's alleged conduct violated the law and that law was clearly established when the alleged violation occurred." *Pueblo Neighborhood Health Ctrs. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988). The defendant prevails unless such a showing is made on both elements. *Harlow*, 457 U.S. at 819.

Under the facts of this case, Defendant is alleged to have made material omissions or misrepresentations as to information he supplied in swearing out a criminal complaint against Plaintiff. In *Salmon v. Schwarz*, 948 F.2d 1131 (10th Cir. 1991), the court held that the law was, at that time, clearly established that the omission of material information from an arrest affidavit violated the Fourth Amendment. *Id.* at 1139. The court further held that if a police officer makes a false statement or omission knowingly or intentionally, or with reckless disregard for the truth in an affidavit for a warrant, then the false statement or omission must be disregarded in deciding whether the affidavit demonstrates probable cause. *Id.*

Thus, in order for Plaintiff to overcome Defendant's assertion of qualified immunity, Plaintiff must demonstrate a genuine issue of material fact as to each of the following for each alleged omission or misrepresentation of fact:

1. There was a misrepresentation or omission in Kling's affidavit or criminal complaint;

2. The misrepresentation or omission was material to the determination by the magistrate of probable cause; and

3. That Kling knowingly, intentionally, or with reckless disregard for the truth made the misrepresentation or omission.

Plaintiff points to three separate omissions or misrepresentations:

1. Kling represented that the crime allegedly committed by the plaintiff (custodial interference) occurred within the state of New Mexico, Dona Ana County.

2. Kling failed to disclose that the plaintiff was not in New Mexico on August 17, 1992, or that Plaintiff picked the children up in El Paso, Texas, on July 9, 1992.

3. Kling failed to state that there was a dispute as to when the children were to be returned – August 17 (Mr. Robert's position) or August 20 (Plaintiff's position).

Plaintiff contends that at the very least, there exists a genuine issue of material fact as to whether Defendant acted with deliberate indifference for the truth in making the above omissions and misrepresentations.

Defendant asserts that the above omissions or misrepresentations are either not material to the determination of probable cause, were not omissions or misrepresentations, or it was reasonable for Defendant to make the challenged statements:

1. Kling's statement in the criminal complaint that Plaintiff committed the offense in Dona Ana County on or about August 17, 1992

is, according to Defendant, a statement regarding his belief as to jurisdiction and the time the offense was committed. Defendant argues this was not a statement of fact and that he can be denied the defense of qualified immunity only if "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that Dona Ana County had jurisdiction. Defendant argues that the law was not clearly established at the time Kling's affidavit was made that jurisdiction for the offense of custodial interference depended on Plaintiff either physically taking the children from the state of New Mexico, rather than having the children delivered to a hotel room in El Paso, Texas, or having been physically in the State of New Mexico at the time Plaintiff failed to return the children to her ex-husband. Defendant states that his belief that Dona Ana County had jurisdiction was objectively reasonable, particularly when it took the court and the attorneys involved over five months to determine that jurisdiction was even at issue.

2. Defendant argues that although neither the affidavit nor the criminal complaint specifically disclose the location of Plaintiff on August 17, 1992, it can be inferred from the information in the documents that Plaintiff was not in the State of New Mexico. Therefore, Defendant challenges whether there has been any omission. Further, Defendant asserts that whether Plaintiff was in New Mexico on August 17 is immaterial as presence in New Mexico at the time the children were to be returned is not required under the statute.

> 3. Defendant contends that the affidavit does disclose that there was a dispute surrounding the date when the children were to be returned, in that Plaintiff told her ex-husband that she would return the children on August 20. Further, the complaint was sworn out on August 21. The dispute surrounding the date is whether the children were to be returned on the 17th or by the 20th. The difference would have had no impact on the magistrate's finding of probable cause.

I address Plaintiff's first two allegations of material omissions or misrepresentations in the criminal complaint simultaneously because they are, in reality, the same issue. I conclude that Defendant did not fail to disclose to the magistrate that Plaintiff was not in the State of New Mexico "on or about" August 17, 1992. The Statement of Facts prepared and sworn to by Defendant clearly disclosed that Plaintiff was in Oregon on August 16, 1992, and subsequently fled her last known address, with the two children, by August 21, 1992. Although her location on or about August 17, 1992, was not specified in the Statement of Facts in Support of Criminal Complaint, I find the record clearly discloses Plaintiff was not in New Mexico on or about that date. Further, I conclude that the statement in the criminal complaint that "on or about the 17th day of August, 1992, in the County of Dona Ana, State of New Mexico, the defendant did . . . " is jurisdictional, not factual. The criminal complaint alleged a violation of New Mexico's Custodial Interference statute for Plaintiff's *failure to return* the children. Thus, I construe Plaintiff's challenge to be directed at the propriety of

Defendant's actions in making the "misrepresentation" that Dona Ana County had jurisdiction.

The Court in *Malley* concluded that a police officer was *per se* qualifiedly immune from suit where a magistrate acts mistakenly in issuing an arrest warrant but within the range of professional competence of a magistrate. *Malley,* 475 U.S. at 346 n.9. I conclude that the magistrate had the information before him to reasonably determine that Plaintiff was not in the State of New Mexico on or about August 17, 1992. As a result, I also conclude that the magistrate made a probable cause determination within his range of professional competence. Therefore, I must determine whether an officer of reasonable professional competence would, nonetheless, have requested the warrant under these circumstances. *Id.*

Contrary to Plaintiff's assertions, I believe Defendant acted as a reasonably competent officer in seeking a warrant for Plaintiff's arrest. At the outset, it must be made clear that this case does not present the situation where an officer fails to disclose material and potentially exculpatory information to the magistrate. Instead, Plaintiff contends that a criminal investigator for the District Attorney acted unreasonably in asserting that New Mexico had jurisdiction, even though a Magistrate, District Attorney Driggers, and Chief Deputy District Attorney Perez all concluded such jurisdiction existed. Indeed, the District Attorney appealed the dismissal of the case with full knowledge of the fact that Plaintiff was not in New Mexico at any time on or about August 17, 1992. No material information was withheld by Defendant from

the magistrate. Given the technical nature of the jurisdictional inquiry, I cannot conclude that Defendant Kling acted unreasonably in seeking a warrant for Plaintiff's arrest. Obviously, if lawyers and judges can disagree on this issue, officers of reasonable competence could as well. *Id.* at 341.

Similarly, based on the facts before me it is undisputed that Defendant did not make a material factual omission or misrepresentation in failing to specifically point out in his Statement of Facts that a disagreement between Plaintiff and Mr. Roberts existed as to the date the children were to be returned to New Mexico. First, that information could be inferred from the Statement of Facts. Second, the dispute was, and continues to be, irrelevant to the determination of whether probable cause existed that the offense in question had been committed. It is undisputed that the criminal complaint was sworn out on August 21, 1992, using the language that "on or about August 17, 1992" an offense had been committed. Plaintiff's side of the dispute was that she was to return the children to New Mexico by August 20, 1992. Even if this had been more forcefully articulated to the magistrate, the determination of probable cause would not have been affected.

For the above reasons, Defendant Kling is entitled to qualified immunity for his actions in signing and filing the Criminal Complaint and the Statement of Facts in Support of the Criminal Complaint. Plaintiff cites no factual support that Defendant intentionally filed a criminal complaint knowing that New Mexico lacked jurisdiction over Plaintiff, and I conclude that Defendant's actions were not objectively unreasonable.

Because of my resolution of the issue of Defendant's swearing out a criminal complaint in Dona Ana County, Plaintiff's other claims must fail as well. First, Plaintiff's claim based on the filing by FBI Agent Lacey of federal charges of unlawful flight to avoid prosecution lacks any factual support. Defendant did not file these federal charges. It is undisputed that District Attorney Driggers contacted the FBI and asked that federal charges be initiated against Plaintiff. Given my decision that Defendant did not act unreasonably in seeking an arrest warrant for Plaintiff in New Mexico, he cannot now be liable for supplying Agent Lacey with the same information he previously supplied to the magistrate. Similarly, Defendant cannot be liable for supplying this same public information to the media.

Accordingly, Defendant's Motion for Summary Judgment should be granted. An order in accordance with this memorandum opinion shall be entered.

/s/ Leroy Hansen
UNITED STATES
DISTRICT JUDGE

For Plaintiff: William L. Lutz
Martin, Lutz & Brower, P.C.
Las Cruces, New Mexico

For Defendant: Maha Khoury
NM Legal Bureau/RMD
Santa Fe, New Mexico

APPENDIX E

Magistrate Criminal Rule 6-201

STATE OF NEW MEXICO

IN THE MAGISTRATE COURT

DONA ANA COUNTY No. 07-03-81-01033A

STATE OF NEW MEXICO Date Filed: 8/21/92

v.

SUSAN LYNN ROBERTS, Defendant(s)

CRIMINAL COMPLAINT

CRIME: Custodial Interference (two counts)
(common name of offense or offenses)

The undersigned, under penalty of perjury complains and says that on or about the 17th day of August, 1992, in the County of Dona Ana, State of New Mexico, the above-named defendant~~XXX~~ did (here state the essential facts):

COUNT I: commit the crime of custodial interference in that the defendant was a person, having a right to custody of a child, who failed to return that child without good cause and with the intent to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody; to-wit: the defendant failed to return Ronald Kenneth Roberts, Jr., a child under the age of 18, to his father, Ronald Kenneth Roberts; a fourth degree felony contrary to Section 30-4-4 NMSA 1978; and

COUNT II: commit the crime of custodial interference in that the defendant was a person, having a right to custody of a ~~XXX~~ child, who failed to return that child without good cause and with the intent to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody; to-wit: the defendant failed to return Aaron Michael Roberts, a child under the age of 18, to his father, Ronald Kenneth Roberts; a fourth degree felony contrary to Section 30-4-4 NMSA 1978;

AS MORE SPECIFICALLY SET FORTH AND DESCRIBED IN THE STATEMENT OF FACTS IN SUPPORT OF CRIMINAL COMPLAINT ATTACHED HERETO AND INCORPORATED HEREIN IN ITS ENTIRETY.

contrary to Section(s) 30-4-4 (two counts) NMSA 1978. I SWEAR OR AFFIRM UNDER PENALTY OF PERJURY THAT THE FACTS SET FORTH ABOVE ARE TRUE TO THE BEST OF MY INFORMATION AND RELIEF. I UNDERSTAND THAT IT IS A CRIMINAL OFFENSE SUBJECT TO THE PENALTY OF IMPRISONMENT TO MAKE A FALSE STATEMENT IN A CRIMINAL COMPLAINT.

If Probable Cause Determination Required:
Probable Cause Found X; Not Found ___
(If not found, complaint dismissed & defendant released)
Date: 21 August 92
Judge: /s/ O. C. Frietz

/s/ Charles Timothy Kling
Complainant

Charles Timothy Kling,
Chief Investigator
Title, (if any)

/s/ Alfred J. Peraz
Approved/Title
Alfred J. Peraz,
Chief Deputy Dist.
Attorney

This complaint may not be filed without the prior payment of a filing fee, unless approved by the district attorney or a law enforcement officer authorized to serve an arrest or search warrant. Approval of the district attorney or a law enforcement officer is not otherwise required.

Distribution Instructions
White – Court Yellow – Defendant Pink – Plaintiff

Approved: Supreme Court, October 1, 1974; amended effective September 1, 1990; April 1, 1991; November 1, 1991.

Criminal Form 9-201 One Page

THIRD JUDICIAL DISTRICT
COUNTY OF DONA ANA
IN THE MAGISTRATE COURT

STATE OF NEW MEXICO

v.

SUSAN LYNN ROBERTS

STATEMENT OF FACTS IN
SUPPORT OF CRIMINAL COMPLAINT

Affiant, who is a full-time salaried peace officer employed by the Third Judicial District Attorney's Office has learned the following from Ronald Kenneth Roberts:

1. That Ronald Kenneth Roberts was formerly married to Susan Lynn Roberts and there were two children born out of this marriage, being Ronald Kenneth Roberts, Jr., date of birth July 28, 1981, and Aaron Michael Roberts, date of birth December 7, 1983.

2. That he was divorced from Susan Lynn Roberts and that a Final Custody Decree was entered on July 21, 1992, in the Third Judicial District Court granting custody of the minor children to Ronald Kenneth Roberts.

3. Pursuant to a Parenting Plan which was submitted to the Third Judicial District Court, Susan Lynn Roberts was allowed to take the children for a six week visitation from the State of New Mexico to the State of Oregon between the inclusive dates of July 9, 1992, and August 17, 1992.

4. Pursuant to the Parenting Plan, Susan Lynn Roberts agreed to return the children to Ronald Kenneth Roberts on August 17, 1992.

5. On August 16, 1992, Ronald Kenneth Roberts called Susan Lynn Roberts to obtain return flight information on the minor children and was informed by Susan Lynn Roberts that she would return the children on August 20, 1992.

6. On August 21, 1992, Ronald Kenneth Roberts filed a Petition for Writ of Habeas Corpus and a Warrant in lieu of Writ of Habeas Corpus was issued by the Circuit Court of Oregon, Washington County on August 21, 1992 and law enforcement authorities in Washington County, Oregon, attempted to serve the Warrant at the last known address of the Susan Lynn Roberts.

7. Law enforcement authorities in Oregon were unable to locate Susan Lynn Roberts or the minor children and were advised by Susan Lynn Roberts' boyfriend that she had left.

APPENDIX F

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

vs. No. 14,976

SUSAN L. ROBERTS,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT
OF DONA ANA COUNTY
GRADEN W. BEAL, District Judge

(Filed Nov. 15, 1993)

TOM UDALL, Attorney General
ANN M. HARVEY, Assistant Attorney General
Santa Fe, New Mexico
Attorneys for Plaintiff-Appellant

SAMMY J. QUANTANA, Chief Public Defender
Santa Fe, New Mexico
Attorney for Defendant-Appellee

MEMORANDUM OPINION

HARTZ, Judge.

The State appeals the dismissal of a criminal complaint against Defendant for custodial interference (failure to return). The calendar notice proposed to affirm the dismissal and the State filed a memorandum opposing the proposed disposition. We affirm.

Defendant was charged under NMSA 1978, Section 30-4-4 (Cum. Supp. 1993), with custodial interference by

failing to return two children to their father after Defendant, the mother, exercised her rights of visitation. There is no dispute that Defendant lawfully took the children from the father in El Paso, Texas. Defendant and the children apparently went to Oregon, where Defendant had been living. There was no evidence that Mother was in New Mexico when she failed to return the children.

The calendar notice proposed to uphold the dismissal of the criminal complaint based on the district court's lack of jurisdiction over the offense charged. The applicable statute provides:

> Custodial interference consists of any person, having a right to custody of a child, maliciously taking, detaining, concealing or enticing away or failing to return that child without good cause and with the intent to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody.

Section 30-4-4(B). Defendant was not charged with maliciously taking, detaining, concealing or enticing the children away. No element of the charge against Defendant, failing to return the children, occurred in New Mexico. Defendant therefore cannot be convicted in New Mexico of the crime for which she was charged. *See State v. Benjamin C.*, 109 N.M. 67, 69, 781 P.2d 795, 797 (Ct. App.) (conviction reversed when the evidence failed to establish that the offense occurred in New Mexico), *cert. denied*, 109 N.M. 54, 781 P.2d 782 (1989).

The State argues that affirming the dismissal would be contrary to the legislative intent and the policies behind the statute and other child custody provisions in

New Mexico. We are not persuaded, however, that the language of the statute permits as broad an interpretation as argued by the State. *See Santillanes v. State*, 115 N.M. 215, 221, 849 P.2d 358, 364 (1993) (statutes defining criminal conduct must be strictly construed and any doubts resolved in favor of lenity). On the contrary, the statutory language evinces a recognition that the statute does not apply unless an element of the crime occurs in this state. Section 30-4-4(J) states, "Violation of the provisions of this section is punishable in New Mexico, whether the intent to commit the offense is formed within or outside the state, if the child was present in New Mexico at the time of the taking." This language appears to assume that the offense is not punishable in New Mexico if the child was not present in New Mexico at the time of the taking and the defendant never possessed in New Mexico the intent not to return the child. We also note that the New Mexico statute appears to authorize prosecution for violations relating to custody orders of other states, again suggesting a recognition that a state cannot punish custodial interference solely on the ground that the custody order was issued in that state.

We affirm the order of dismissal.

IT IS SO ORDERED.

/s/ Harris L. Hartz
HARRIS L. HARTZ, Judge

WE CONCUR:

/s/ Lynn Pickard
LYNN PICKARD, Judge

/s/ Bruce D. Black
BRUCE D. BLACK, Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUSAN LYNN ROBERTS, Plaintiff-Appellant,	)	
v.	)	No. 95-2272
CHARLES TIMOTHY KLING, Defendant-Appellee.	)	

ORDER

Filed July 31, 1998

Before **PORFILIO, ALARCON***, and **LUCERO**, Circuit Judges.

Appellant's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on

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*Honorable Arthur L. Alarcon, Senior Circuit Judge, United States Court of Appeals for the Ninth circuit, sitting by designation.

rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

/s/ Audrey F. Weigel
Deputy Clerk